IN THE HIGH COURT OF BOMBAY AT GOA.

SECOND APPEAL NO. 7 OF 2002.

1. Shri Ramakant Palayekar,
   Driver in Navy.
2. Smt. Sakhu Ramakant Palayekar,
   both residents of
   Dabolvaddo, Chapora,
   Bardez Goa. ... Appellants.

Versus

1. Mrs. Shera Albuquerque,
   Arpora, Bardez Goa.
2. Mr. Reginaldo Rafael Albuquerque,
   r/o Vagator, Anjuna, Bardez Goa. ... Respondents.

Mrs. A.A. Agni, Advocate for the Appellants.

Mr. Sudin Usgaonkar with Miss Prema Matkar, Advocates for the Respondents.

Coram: P.V. HARDAS, J.

Date: 20th June 2002.

ORAL ORDER.

The unsuccessful defendants in the two Courts below have challenged the Judgment and Decree dated 6th March 2000, passed by the First Additional Civil Judge, Junior Division, Mapusa, in Regular Civil Suit No. 34/1984/1st.Addl., and the Judgment and Decree passed by the Additional District Judge, Mapusa, dated 3rd October 2001, in Regular Civil Appeal No. 69 of 2000. I have heard Mrs. Agni, the learned counsel appearing for the appellants, who has urged the following grounds as substantial questions of law:-

> "a) Whether certificate of the communidade produced at Exhibit P.W.1/G, reservation Exhibit P.W.1/H colly as also the deed of

> relinquishment could be said to have been proved in absence of the Examination of maker of the documents and whether by mere exhibiting of the documents it can be said that there is proof of contents of the documents and what is the effect of a property being shown in the plan (tombacao) of the communidade?
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> b) Whether the relief of, permanent injunction could have been granted in favour of the respondents when at the stage of temporary injunction the respondents were found to be not in possession of the plot in question and on the contrary the appellants were found to be in possession of the plot in question and whether the relief of permanent injunction could have been granted in favour of the respondents in absence of any finding that the respondents are in possession of the plot in question?"

In respect of the first ground, it would be useful to make a reference to issue no. 4 which was framed by the learned trial Court:-

> "whether the defendant proves that Talhao no. 306 of lote 510 of Anjuna was given in their possession by Communidade of Anjuna in 1978?"

2. The learned trial Court has held that in view of the admission of defence witnesses as also in the absence of any documentary evidence in support of the grant of possession, this issue is determined in the negative. The respondents/plaintiffs claim suit property through one Leonar Albuquerque and Hermigildo Albuquerque. The name of Leonor is recorded as owner of old survey nos. 2624, 2625 and 2627 alongwith the name of Hermigildo in old survey no. 2623, vide Exhibit

P.W.1/M. The new survey record shows the name of one Rubertina D'Souza as occupant of the suit property and the defendants have admitted that the entry is incorrect.

3. The learned lower appellate Court has held in paragraph 8 that there is no particular dispute that the property as described by the plaintiffs and bearing lote no. 510 comprising of two plots/talhao 305 and 306 being part of 331/1. The learned lower appellate Court has also held in the same paragraph "for that matter, there is no singular dispute that the name of Mary D'Souza has been erroneously recorded in the survey records and that the property originally belonged to the Communidade. It is also not particularly in dispute that the name of the plaintiffs' predecessor were appearing in the old cadastral survey records."

4. The learned lower appellate Court, while considering if the plaintiffs had proved that they were the co-owners in the suit land and that the defendants were interfering with their possession, made a detailed reference to the evidence of P.W.1 Julie. The learned lower appellate Court made a reference to the various documents, namely, survey records Form I and XIV at Exhibit P.W.1/C Colly, the old cadastral plan at Exhibit P.W.1/D, the affidavit of Sebastiana at Exhibit P.W.1/F

and the certificate of the Communidade at Exhibit P.W.1/G, the resolution at Exhibit P.W.1/H Colly and the deed of relinquishment at Exhibit P.W.1/I. The appellate Court then, while appreciating the evidence of P.W.1, has observed "the tenor of cross-examination is not at all adequate to displace the case of the plaintiffs." The appellate Court has also made a detailed reference in paragraph 9 to the evidence of plaintiffs' witness one Vincent. The appellate Court also examined the evidence of the other witnesses examined on behalf of the plaintiffs and particularly the evidence of the surveyor, who, on the basis of the old cadastral survey plan alongwith the extract of the old survey register as also the tombacao plan of lote no. 510 and the new survey plan, had visited the site and on basis of physical signs, roads and boundary marks had identified the plots under old survey nos. 2624 and 2625 vis a vis the new survey plan. The new survey plan is at Exhibit P.W.6/B.

5. The appellate Court then also examined the evidence of the witness examined by the defendants. The learned lower appellate Court in paragraph 9 has observed "his admission that he does not have any document to show that the possession of plot of 500 square metres was handed over to him by the Communidade and further that he had not paid annual foro in respect

of the said plot clinches the case against the defendants." The appellate Court, therefore, observed that his bare statement that possession was given to him by the Communidade in 78 is neither here nor there.

6. The learned lower appellate Court then addressed itself to the proof of title of the plaintiffs and the defendants, examined the documents and the challenges to the documents by holding in paragraph 11 that the plaintiffs had been able to substantiate their claim to the suit property 331/1 which, admittedly, comprises of lote no. 510 and talhao 305 and 306.

7. Mrs. Agni, the learned counsel appearing for the appellants, has relied on the Judgment in **Om Prakash Berlia and another v. Unit Trust of India and others,** A.I.R. 1983 Bombay 1 to urge before me in respect of the substantial question at (a) that in the absence of examination of the witness, the public documents could not have been relied upon.

8. The Judgment cited by the learned counsel for the appellants is clearly distinguishable on facts and the ratio of the said Judgment does not apply to the present case. The learned lower appellate Court on preponderance of probabilities and on the basis of the documents tendered by the parties had decided that the

learned trial Court was perfectly justified in decreeing the suit of the plaintiffs. I see no perversity in the reasoning of the lower appellate Court so as to warrant any interference in Appeal.

9. In respect of the second ground it is urged before me that since at the stage of temporary injunction the learned trial Court had not found the respondents to be in possession of the plot, the Courts below had erred in granting the relief of permanent injunction in favour of the plaintiffs. The learned trial Court, on the basis of the evidence, had answered issue no. 2, namely, whether the plaintiffs prove that they are the co-owners in possession of the suit land, in the affirmative. Findings which are recorded at the interlocutory stage are not binding on the Courts when the Courts are called upon to give a finding on merits after appreciation of the evidence. In view of this, according to me, the substantial question at (b) can hardly be said to be a question of law, much less a substantial question of law.

10. I, thus, see no merit in the Second Appeal and the same deserves to be dismissed as it does not involve any substantial questions of law. The two Courts below have appreciated the evidence and the lower appellate Court being the last Court of appreciation of the facts

has correctly appreciated the facts and has dismissed the appeal. The reasoning of the two Courts below does not warrant any interference in Second Appeal.

11. In the result, therefore, this Second Appeal is dismissed with no order as to costs.

(P.V. HARDAS)
JUDGE.

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